No. 7306

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ETHLYN B. CLEMENTS, individually and as administratrix of the estate of Ralph L. Clements, also known as R. L. Clements, deceased,

Appellant,

vs.

GEORGE W. COPPIN, as trustee in bankruptcy of the estate of the Flintex Corporation (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

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On the oral argument of this case, this honorable court asked me whether I would advise my client to pay the money as ordered by the trial court. I answer that I have advised her to pay it, but she assures me that she has no money, and she tells me that she had no part of this money at the time of the hearing to show cause. I have also advised her if there is any way she can borrow or raise the money

to do so. Again she assures me that it is impossible for her to do so.

Appellant is in an unfortunate situation, in this; she received this money in 1927 by order of distribution from the administrator of Clements' estate prior to any notice of plaintiff's claim; she invested it in stocks and in the crash of 1929, she was wiped out. The report of the Master should have been excepted to and the whole matter brought before the trial court, which was not done. I was not her attorney in those proceedings.

If this case is affirmed, Mrs. Clements will have to go to jail for life, unless some other relief is granted.

We are not attacking the turnover order, because an attack here would be a collateral attack on that order.

We have but two contentions in this case (a) That her verified answer (Trans. 3) presented an issue at the time of the hearing to show cause, upon which she was not accorded a hearing, (b) The order of commitment (Trans. 10) is void for the want of a finding therein that at that time she was able to perform and pay the money.

In addition to the case cited in the brief for the appellant, we cite:

> "It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court, is erroneous as a matter of law, where the bankrupt by a sworn answer denies that he

> has the money or goods, and it does not *appear clearly and affirmatively from the record,* notwithstanding his denials, that he has the power to comply with the decree." (Italics ours.)
>
> *In re Cole,* 163 Fed. 189.

The record in this case nowhere shows, clearly or affirmatively, that at any time, appellant was able to pay over this money.

In the case of *Cooper v. Dasher,* 78 L. Ed. 31, there is no question involved in regard to the inability or power of the defendant to perform and no question is raised as to existence of the goods. The only contention of the defendant in that case was that the turnover order was so indefinite that the goods could not be identified. The Supreme Court held that description in the order, "gives the only description that the nature of the case allows". It is clear that the only point involved or decided, was the sufficiency of the description of the goods in the turnover order. The case is not in point on the questions involved in the instant case.

In *Oriel v. Russell,* 278 U. S. 358, 73 L. Ed. 419, Chief Justice Taft said (second column L. Ed., p. 425):

> "Where it has failed and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely the bankrupt's inability to obey the order, he has always been released, and I need hardly say that he would always have the right to be released, as soon as the fact becomes clear that he cannot obey."

This is all we ask in this case. Appellant had no opportunity to show her inability to obey. This is shown by the minutes of the court (Trans. 15) and the court's statement. (Trans. 16.) The fact that she served six days in jail is evidence that she was unable to pay. (Trans. 19.) It may be said that counsel, who then represented appellant was lax in not insisting upon a hearing, but in our opinion, that does not militate against the justice of her plea to be released from serving in jail when she is in truth and in fact unable to pay the money.

However, the report of the Special Master is not before this court and therefore, there is no evidence in the case as to what the findings of the Master were. The only thing in the record are the recitals contained in the turnover order. (Trans. 7.) To say the least, the evidence is not clear and convincing, as Judge Taft says in the *Oriel* case:

> "We think a proceeding for a turnover order in bankruptcy is one the right to which should be supported by clear and convincing evidence."

We respectfully ask that the case be reversed to the end that she be accorded a hearing upon her sworn answer and on her inability to perform.

Dated, San Francisco,
April 4, 1934.

Respectfully submitted,
THOMAS F. MCCUE,
Attorney for Appellant.